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Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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December 18, 2002

The Honorable John D. Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

As you know, one of the principal purposes of the 1996 Telecommunications Act ("1996 Act") was to spur competition in the telecommunications industry.[1] Congress voted, on an overwhelmingly bipartisan basis, to replace outdated regulations with market-oriented competition rules.

As part of the policy of promoting competition, the 1996 Act specifically authorized the Regional Bell Operating Companies – who then possessed, and now possess, monopoly control of local telecommunications markets – to compete for local telecommunications services outside their region where they could take advantage of the Act's provisions that give them market access to the incumbent's facilities.[2] Indeed, Congress enacted the 1996 Act, giving the Bells the ability to access lucrative long distance markets from which they had been prohibited,[3] relying, in part, on public pledges that they would seek to advance the goals of competition by entering local telecommunications markets outside their region.[4]

It is in this context that we are troubled by the public declaration of the Chief Executive Officer of Qwest, Richard Notebaert, that it would be fundamentally wrong to compete in the territory of SBC/Ameritech noting that it "might be a good way to turn a quick dollar but that doesn't make it right."[5] Interestingly, this pronouncement that Qwest would forgo lucrative opportunities in its sister monopoly markets and in its principal line of business, came as Qwest announced a 3rd quarter loss of $214 million and 13% fall in revenue, to $3.8 billion from $4.37 billion a year earlier.

In our view, this public pronouncement seems to suggest the need for scrutiny by the Antitrust Division. As you are well aware, the Sherman Act proscribes, with criminal and civil penalties, agreements to divide market territories.[7] A long line of cases holds that any such agreement would be a *per se* violation of the Sherman Act.[8]

No one would challenge the assertion that the Bells collude extensively in their efforts to get Congress and regulators to undo market access laws. In near choreographed unison they bemoan the laws that require them to open their monopoly facilities to competition. It is less clear, however, to what extent their very apparent non-competition policy in each others' markets is coordinated. While collusion by the Bells on legislative or regulatory matters is permitted under the antitrust laws, any arrangement to carve up market territories would not be permitted under antitrust law.

It is imperative, in our view, that the Justice Department closely examine whether the coordinated market behavior on the part of the Bells justifies the dismissal of their non-compete policy as merely "conscious parallelism." In doing such an analysis, we note that, in *Milgram v. Loew's Inc*,[9] the Third Circuit held that "uniformity in policy forms the basis of an inference of joint action" and that when a firm "acted in apparent contradiction of its own self interest [t]his strengthens considerably the inference of conspiracy."[10]

Indeed, the courts have held that seemingly coordinated and irrational policies or practices that carve up markets with anticompetitive effects warrant scrutiny,[11] and that seemingly casual agreements that produce anticompetitive effects may run afoul of the antitrust laws.[12]

Therefore, we request that you open an immediate inquiry into these non-compete practices to determine whether any illegal arrangement exists that would explain why the Bell monopolies, who claim they are falling on hard times, elect not to pursue a lucrative avenue for their shareholders.

Sincerely,

John Conyers, Jr.
Ranking Member

Zoe Lofgren
Member of Congress

cc: Honorable F. James Sensenbrenner, Jr.

[1] *See generally*, Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat 56 (1996) (1996 Act), 47 U.S.C. § 251.

[2] *See* 47 U.S.C. §§ 271(b)(2) & 271(j).

[3] *See* H.R. Rep. No 104-458, 104th Congress, 2d Sess. 1 (1996). The long distance restriction was also known as the "inter-LATA" restriction. This is because the Modified Final Judgement (MFJ) created 197 local access and transport areas or "LATAs," representing areas across which the Bells are not permitted to offer

telecommunications services. For example, under the MFJ, Michigan Bell (Ameritech) could not complete a call from Detroit to Lansing since it would cross a LATA; instead Michigan Bell was required to hand off the call to a long distance company who completed the call for the consumer. (LATAs are not synonymous with area codes.)

[4] "*Summary of SBC/Ameritech Conditions,*" para. IV, 21, www.fcc.gov/bureaus/common_carrier/news_releases/1999/nrc9077a.txt, ("Within 30 months from the merger closing, SBC/Ameritech will enter at least 30 major markets outside of its region as a facilities-based competitive provider of local services to business and residential customers. SBC/Ameritech is liable for voluntary incentive payments of nearly $1.2 billion dollars if it misses the entry requirements in all 30 markets.")

[5] "*Ameritech Customers Off Limits: Notebaert,*" Jon Van, Chicago Tribune (Oct. 31, 2002).

[6] "*FCC Ensures Bell Atlantic Compliance with Terms of Long Distance Approval; Bell Atlantic Agrees to Pay Up to $27 Million,*" FCC News (March 9, 2000).

[7] 15 U.S.C. § 1.

[8] *See U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126,1131 L.Ed.2d 515 (1972) (holding that market divisions utilizing retail licensing is *per se* illegal); *General Leaseways Inc. v. National Truck Leasing Ass'n,* 744 F.2d 588 (7th Cir., 1984).

[9] 192 F.2d 579 (3rd Cir., 1951).

[10] *Id.* at 583; *see also Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939).

[11] *Boise Cascade Corp, v Federal Trade Commission*, 637 F.2d 573 (9th Cir., 1980).

[12] *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *American Column & Lumber Co., v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil*, 262 U.S. 37 (1923).